United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7187

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JEAN D'AGOSTA

Plaintiff-Appellee,

vs.

W. T. GRANT COMPANY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF DEFENDANT-APPELLANT

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APPROVING ORDER OF LATIMER, M.

REPLY BRIEF OF DEFENDANT-APPELLANT

I.

The Federal District Court Has No Jurisdiction over Claims Arising under Truth-in-Lending Laws in the State of Connecticut.

It is defendant's position that 15 U.S.C. §1633 does not empower the Federal Reserve Board (the "Board") to limit an exemption from the requirements of federal law by providing that it shall not extend to the civil liability provisions of 15 U.S.C. §1640 and by further providing that

state law shall be adopted by reference into federal law. Defendant has argued in its brief that Congress' intention that state law shall pre-empt federal law is decisively established not only by the language employed in 15 U.S.C. §1633 but also by the legislative history. In its brief, plaintiff makes five arguments: (1) Congress has recently "ratified the Board's interpretation of the Act's exemption statute [*sic.*], 15 U.S.C. §1633", App'ee's Br. p. 8; (2) the acceptance by the conferees of the House's administrative enforcement provisions gave the Board the "discretion" to grant a qualified exemption in order to ensure that the Act is "effectively administered and enforced", App'ee's Br. p. 12; (3) the Board's interpretation of the Act is entitled to great deference by the courts, App'ee's Br. pp. 5-7, 9; (4) if the limitation is invalid the entire exemption falls *and* federal law retroactively applies and provides the basis for federal jurisdiction, App'ee's Br. p. 13; and (5) because defendant did not raise the jurisdictional issue below, it may not raise it on appeal, App'ee's Br. p. 26. Defendant shall deal with plaintiff's arguments *seriatim*.

Public Law 93-495, effective upon signature of the President on October 28, 1974, contained what the Conference Report, H. Rep. No. 93-1429, referred to as "a series of basically technical amendments" to the Truth-in-Lending Act. 120 Cong. Rec. H9944 (daily ed. October 4, 1974). The house bill had contained no such amendments and the conferees had accepted the final Senate version. *Id.* In a debate on S.2101, one of the Senate bills, both Chairman Sparkman of the Committee on Banking, Housing and Urban Affairs, and Senator Proxmire, a member of the committee and the driving force behind the original Truth-in-Lending Act, also referred to the Truth-in-Lending amendments as basically technical. 119 Cong. Rec. S.14403, S.14406 (daily ed. July 23, 1973). The legislative his-

tory of the amendments not only confirms that they were technical only (the major provision limits the amount of recovery in class actions and was the subject of almost all of the debate), but also, to the best of defendant's knowledge, contains no reference to the jurisdictional question here at issue.

Thus, there is no indication that Congress, at any time during the consideration of the recent amendments, had received notice of or gave any thought whatsoever to the jurisdiction-creating adventure of the Board. As pointed out by Professor Davis in his treatise on administrative law, "[w]henever a congressional awareness of the administrative interpretation does not appear and seems unlikely, the basis for the reenactment [ratification] rule vanishes." K. C. DAVIS, ADMINISTRATIVE LAW TREATISE §5.07 (1958), cited with approval in *Leary* v. *United States*, 395 U.S. 6, 25 n.40 (1969).

Furthermore, we are not dealing with an unchallenged administrative construction of long standing which is the paradigm fact situation giving rise to the ratification arguments. *See, e.g., Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). The Connecticut exemption was granted relatively recently, and to date only five states, including Connecticut, have received exemptions.

Moreover, the ratification rule is inapposite when an agency is attempting to "bootstrap itself into an area in which it has no jurisdiction. . . ." *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. at 745.

And, when a regulation exceeds the agency's power as set forth by Congress, reenactment without more cannot give it legitimacy:

> re-enactment cannot save a regulation which "contradict[s] the requirements" of the statute itself. When a regulation conflicts with the statute the fact of

> subsequent re-enactment "is immaterial, for Congress could not add to or expand [the] statute by impliedly approving the regulation." *Commissioner* v. *Acker,* 361 U.S. 87, 93 (1959).
>
> *Leary* v. *United States,* 395 U.S. 6, 25 (1969) (brackets supplied by the Court.)

Thus, the argument that Congress "ratified" the Board's attempt to confer federal jurisdiction over state law violations is wholly unsupported and without substance.

Plaintiff's second argument, that the acceptance by the conferees of the House's administrative enforcement provisions gave the Board the "discretion" to grant a qualified exemption in order to ensure that the Act is "effectively administered", is not relevant to the jurisdictional issue. Section 1633 does not distinguish between "administrative" and "judicial" enforcement. The only situation in which Congress ever intended an exemption to be "partial" is where state law limits itself to certain classes of transactions covered by federal law; in such case an exemption would apply only to that class of transactions covered by the state law and would thereby be a "partial" exemption only in the sense that the other requirements of federal law, not addressed by the state legislation, would continue in force. In an exhaustive review of the legislative history defendant failed to find a scintilla of evidence of a broader or contrary intention; plaintiff's brief confirms defendant's conclusion that no such evidence exists. Indeed, after acceptance of the final bill, Senator Sparkman emphasized on the Senate floor that "[s]hould the States enact legislation substantially similar to the Federal bill, they can become exempt from the Federal law." 114 Cong. Rec. 11492 (May 22, 1968).

Plaintiff's third argument is that the Court must accord "great deference" to the Board's interpretation of the Act. The Supreme Court, however, has repeatedly held that in

regard to questions involving jurisdiction the doctrine of "great deference" is inapplicable. *See, e.g., Barlow* v. *Collins,* 397 U.S. 159, 166 (1970) ("On the contrary, since the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of the canons of statutory construction."); *Leedom* v. *Kyne,* 358 U.S. 184 (1958); *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express,* 351 U.S. 49, 54 (1956) ("The Commission is the expert in the field of transportation. . . . But Congress has placed limits on its statutory powers; and our duty . . . is to determine those limits."); *Social Security Bd.* v. *Nierotko,* 327 U.S. 358, 369 (1946) ("An agency may not finally decide the limits of its statutory power. That is a judicial function."); *cf. Crowell* v. *Benson,* 285 U.S. 22 (1932).

The Board of Governors of the Federal Reserve has no expertise to exercise in regard to the limits of their own power under the Act or the jurisdiction of the federal courts; these questions are within the special expertise of the courts. The two principal cases cited by the plaintiff in support of deference, *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356 (1973), and *N. C. Freed Co., Inc.* v. *Board of Governors of the Federal Reserve System,* 473 F.2d 1210 (2d Cir.), *cert. denied,* 414 U.S. 827 (1973), are inapposite. Those cases involved the interpretation of technical provisions of the Act and, therefore, were well within the agency's expertise. *Mourning* involved the validity of the Board's "Four Installment Rule" interpretation of Regulation Z (a disclosure regulation), while *Freed* involved the Board's definition of "security interest."

Plaintiff's fourth argument is that if the limitations contained in the Regulation, 12 C.F.R. §226.12(c), are invalid,

the entire exemption must fall *and* federal law would retroactively apply and provide a basis for federal jurisdiction. A basic canon of statutory construction is that if an invalid portion of a statute, regulation, or other application is severable from the remainder, the court, where possible, should only strike down the offending portion in order to effectuate the legislative purpose. *See, e.g., Fowler* v. *Gage,* 301 F.2d 775, 778-79 (10th Cir. 1962) ("Furthermore, we think the regulation is well within the spirit and general purpose of the law. Neither is its validity, even if subsection (i) should be declared void, affected thereby. The law is well settled that when a part of a statute is declared void, the entire statute falls unless the invalid portion can be separated from the remaining part of the statute. That applies with equal force to a regulation which has the force of law . . ."). This rule applies whether or not Congress has included the familiar "severability" clause in the enabling legislation. *United States* v. *Jackson,* 390 U.S. 570, 585 n.27 (1968). In the Truth-in-Lending Act, however, Congress expressed its desire for severability in the event that a section of the act, or an application by an administering agency, were invalidated. Section 501 of the Act, Pub.L. 90-321, provides in pertinent part that "[i]f a provision enacted by this Act is held invalid in one or more of its applications, the provision remains in effect in all valid applications that are severable from the invalid application or applications." Here, the offending *limitation* is mere surplusage, since the Congressional intent was to foster exemption whenever the Board determines, as it did here, that the state law is "substantially similar" to federal law and adequate provision for enforcement exists.

Plaintiff's final argument is that because defendant did not raise the jurisdictional issue below, it may not raise it

on appeal. But it is elementary that lack of subject matter jurisdiction may be raised for the first time on appeal, Fed. R. Civ. P. 12(h), 1 Moore, Federal Practice ¶ 0.60[4] (2d Ed. 1974), and this Court may remand to the District Court with instructions to dismiss, *Thompson* v. *New York Central Railroad Co.*, 361 F.2d 137, 144-45 (2d Cir. 1966). Indeed, this Court *sua sponte* may raise the jurisdictional issue and dismiss. *See, e.g., U.S.* v. *Todel,* —— F.2d ——, Nos. 74-1062, 74-1816, Slip Opinion at p. 1895 (2d Cir. February 24, 1975); *Givens* v. *W. T. Grant Co.*, 457 F.2d 612 (2d Cir.), *vacated on other grounds,* 409 U S. 56, *modified on other grounds,* 472 F.2d 1039 (1972).

II.

The District Court Erred in Granting Partial Summary Judgment for Plaintiff on Her Truth-in-Lending Allegations.

In her brief, plaintiff alleges three specific violations of the Connecticut Truth-in-Lending Act:

> "a. The term "unpaid balance" is not used. . .
>
> b. The finance charge was not clearly, conspicuously, and meaningfully disclosed. . .
>
> c. The Defendant failed to describe each amount included within the finance charge." App'ee's Br., p. 14.

Defendant has discussed in detail in its earlier brief, the District Court's error in granting summary judgment as to those three specifications, App't's Br. pp. 16-29; this reply brief will not repeat that earlier discussion, but will merely address the new arguments raised by plaintiff.

A. The Term "Unpaid Balance" Is Not Required upon the Facts of the Instant Case.

In her brief, plaintiff contends that the "Unpaid Balance" and "Unpaid Balance of Cash Price" are both required disclosures. In support of that position, plaintiff argues that the "Unpaid Balance" is the "total of [lines] 3 plus 4" on defendant's contract blank and, therefore, is not the same as the "Unpaid Balance of Cash Price", which constitutes "line 3" of that contract. App'ee's Br. pp. 16-17.[1] Defendant concedes for the purpose of argument that plaintiff's contention would be correct *if* there were some charge assessed for "property insurance", i.e. if there were some charge on line 4, which would be added to the "Unpaid Balance of Cash Price" (line 3). In this case, however, the contracts submitted by plaintiff in support of her motion for summary judgment plainly indicate that plaintiff did not purchase insurance and that no such "line 4" charge was made. (App. pp. 15a-17a). Plaintiff contends that the "Prior Balance due after rebate of FINANCE CHARGE" (line B) is included in the "Amount Financed" (line 7) and, therefore, is a "charge . . . which [is] included in the amount financed but which [is] not part of the finance charge." Conn. Reg. § 36-395-7(c)(4) (12 C.F.R. § 226.8(c)(4)). This argument misinterprets the meaning of the word "charge." The word "charge", as used in Regulation Z, means a "cost", *cf.* Conn. Reg. § 36-395-1(17) (12 C.F.R. § 226.2(q)).[2] The "Unpaid Balance due after rebate of FINANCE CHARGE" is not a "cost" in the sense used in the Regulation, since it is the money which plaintiff was permitted to use, not addi-

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1. A copy of each of the contracts signed by plaintiff is attached to plaintiff's motion for summary judgment and reprinted in the Appendix (App. pp. 17a-18a).

2. " 'Finance Charge' means the *cost of* credit determined in accordance with section 36-395-3 [§ 226.4]."

tional money which she was required to pay in order to obtain credit. Furthermore, plaintiff's argument would, in cases such as the instant one, render the term "Amount Finance" superfluous. Since there are no prepaid finance charges or required deposit balances in this case, "Amount Financed" would be identical to "Unpaid Balance" if the outstanding balance were to be considered a "charge" under Conn. Reg. § 36-395-7(c)(4) (12 C.F.R. § 226.8(c)(4)). Since the District Court in acting upon a motion for summary judgment must rely solely upon the record before it, rather than assuming some hypothetical set of facts, Fed. R. Civ. P. 56(c), summary judgment was improper in the instant case.

The Federal Trade Commission proceedings cited by plaintiff are totally inapposite. In *Beauty-Style Modernizers, Inc.*, CCH Consumer Credit Guide ¶ 98,791 (F.T.C. 1974), *Charnita, Inc.*, 80 F.T.C. 892 (1972), *aff'd and enforced* 479 F.2d 684 (3rd Cir. 1973), and *Zale Corporation*, 78 F.T.C. 1195 (1971), *petition for review denied* 473 F.2d 1317 (5th Cir. 1973), there is absolutely no allegation that the respondents failed to employ the term "Unpaid Balance." In *Seattle Mobile Homes, Inc.*, 78 F.T.C. 340 (1971) and *McMahans Furniture Enterprises*, 81 F.T.C. 104 (1972), the allegations of the complaints indicate that the respondents, unlike defendant in this case, added other charges to the "Unpaid Balance of the Cash Price." For example, the complaint in *McMahans Furniture Enterprises* charges the respondent with:

> "failing to use the term "Unpaid Balance" to describe the *sum* of the unpaid balance of the cash price *and all other charges which are included* in the amount financed but which are not part of the finance charge." 81 F.T.C. at 111 (Emphasis added); *see also* 78 F.T.C. at 345.

The Federal Reserve Board, Letter No. 84[illegible], September 19, 1974, CCH Consumer Credit Guide ¶31,164,[3] and Federal Trade Commission, F.T.C. Informal Staff Opinion Letter of July 21, 1971 [Transfer Binder Truth-in-Lending Special Releases—Correspondence April 1969 to April 1974] CCH Consumer Credit Guide ¶30,705, letters relied upon by plaintiff, App'ee's Br. pp. 18-19, likewise do not support her position. In fact, neither letter deals at all with the section of the regulations at issue in this case. Here, the issue is whether the term "Unpaid Balance" is necessary, where there are no "other charges" to be added, Conn. Reg. §36-395-7(c)(3)-(5) (12 C.F.R. §226.8(c)(3)-(5)), and the "Unpaid Balance of the Cash Price" therefore equals the "Unpaid Balance." In both the letters cited by plaintiff, however, the issue was whether the term "Unpaid Balance" is necessary where there *are* "'other charges' included in the amount financed but not part of the finance charge". The "Unpaid Balance of the Cash Price" is never discussed in either opinion. Further, to the extent that the cited F.R.B. opinion is applicable, it does not purport to set a requirement that the term "Unpaid Balance" be used. Rather, it merely recommends that creditors take a conservative tack and include the term, despite the F.R.B.'s exclusion thereof in its Handbook, "What You Ought to Know About Truth-in-Lending." The opinion states:

> Therefore, in view of the recent court decisions and other Federal agency opinions, we would advise creditors to incorporate the term into disclosure statements, even though the disclosure statement illustrated on page 22 of the pamphlet *What You Ought to Know About Truth in Lending,* may indi-

3. Plaintiff erroneously cites this letter as CCH Consumer Credit Guide ¶31,165.

cate that such a disclosure may not be required in such circumstances. CCH Consumer Credit at 66,521.

On the other hand, the F.R.B. staff letter cited by defendant, App't's Br. p. 18, F.R.B. Letter No. 536, September 23, 1971, [Transfer Binder Truth-in-Lending Special Releases—Correspondence, April 1969 to April 1974] CCH Consumer Credit Guide ¶30,748, which plaintiff completely ignores in her brief, is directly on point, holding that the "Unpaid Balance" need not be disclosed where it does not differ from the "Unpaid Balance of Cash Price." Upon that administrative authority, and upon *Ivey* v. *Atlanta Gas and Light Company,* ——F.Supp.—— (N.D. Ga. 1974) CCH Consumer Credit Guide ¶98,704, defendant submits that the District Court erred in holding to the contrary and that the partial summary judgment for plaintiff should be reversed upon that specification.

B. The District Court Erred in Granting Summary Judgment on Plaintiff's Allegation That the "Finance Charge" Was Not Disclosed in a Meaningful Manner.

Rather than demonstrating the validity of the decision below, plaintiff's brief emphasizes the District Court's error in resolving a question of fact upon a motion for summary judgment. Plaintiff sets forth at length her interpretation of the analysis which she claims a consumer would use in reading the retail instalment contract, App'ee's Br. p. 21 n. 7. She concludes that the "natural result", App'ee's Br. p. 21 n. 7, of that reading would be to view the "net finance charge" as the finance charge. This conclusion is directly contrary to the equally "natural" reading set forth by defendant in its brief. App't's Br. pp. 23-24. It is precisely the question of which analysis is more likely to be applied by a credit purchaser and, consequently, whether

the finance charge disclosure is "clear and meaningful" which must be resolved at trial. *Peritz* v. *Liberty Loan Corporation*—F. Supp.—(N.D. Ill. 1973), [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶ 98,969, *appeal docketed* No. 74-1667, 7th Cir. August 20, 1974; *cf., Empire Electronics Co.* v. *United States,* 311 F.2d 175 (2nd Cir. 1962). *Welmaker* v. *W.T. Grant Company,* 365 F. Supp. 531 (N.D. Ga. 1972), upon which plaintiff relies, is totally inapposite on an appeal from summary judgment. In *Welmaker,* the District Court held a hearing prior to the imposition of liability on defendant; in this case, it is precisely such a hearing that defendant requests.

Plaintiff's reliance upon the defendant's failure to submit any extrinsic evidence on the clarity of the documents is misplaced. The document itself leaves open the question as to the clarity thereof and plaintiff set forth no evidence to establish the meaning that would be placed thereon by a consumer. Therefore, the question of interpretation of the disclosure statement remains open. *Cf. American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.,* 388 F.2d 272 (2nd Cir. 1967); *Empire Electronics Co.* v. *United States,* 311 F.2d 175 (2nd Cir. 1962).

C. The District Court Erred in Holding That "Itemization" Is Necessary Where the Finance Charge Contains Only One Item.

Defendant contends that its finance charge on the contracts at issue in this case consists of only one item and, therefore, as a matter of law, the use of the term "finance charge" without any further itemization is an adequate disclosure. App't's Br. pp. 25-29.

In her brief, plaintiff misconstrues the effect which defendant attributes to the F.R.B. opinion letter of April

25, 1973, cited in support of this position. Letter No. 682 [Transfer Binder Truth-in-Lending Special Releases—Correspondence April 1969 to April 1974] CCH Consumer Credit Guide [30,972, App'ee's Br. p. 25. Contrary to plaintiff's contention, defendant maintains neither that it relied upon the letter in drafting its form nor that the letter creates a new exemption to Regulation Z. Rather, defendant simply takes the position adopted by numerous courts, that the construction given by the F.R.B. to its own Regulation should be granted great deference in determining the meaning of that Regulation, *Philbeck* v. *Timmers Chevrolet, Inc.*, 499 F.2d 971 (5th Cir. 1974); *Bone* v. *Hibernia Bank*, 493 F.2d 135 (9th Cir.), *cert. denied*, 414 U.S. 1068 (1974); *Evans* v. *Household Finance Corp.*,——F. Supp.——(S.D. Iowa 1973), [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶ 99,007, *appeal dismissed*, August 3, 1973 8th Cir. Dkt. No. 73-1463.

Plaintiff seeks to impute Judge Frankel's criticism of one particular opinion letter by Staff Attorney Garwood, *Ratner* v. *Chemical Bank New York Trust Company*, 329 F. Supp. 270 (S.D.N.Y. 1971), to the totally different letter at issue in this case. That argument is patently fatuous. As a leading F.R.B. staff attorney, Garwood issued numerous letters, *see* [Transfer Binder Truth-in-Lending Special Releases—Correspondence April 1969 to April 1974] CCH Consumer Credit Guide; it is illogical to argue, as plaintiff does, that possible errors in the reasoning of one such letter extend *a priori* to all.[4]

Plaintiff's contention that the language of Conn. Reg. 36-395-7(c)(8)(A) (12 C.F.R. § 226.8(c)(8)(i)) is "clear

4. Plaintiff also argues that the facts underlying the Garwood opinion letter are not set forth in defendant's brief. Attached hereto as Addendum A is the text of the letter requesting that ruling; a reading thereof demonstrates that it is on all fours with the instant case.

and unambiguous", App'ee's Br. p. 24, is incorrect. That section enumerates eight disclosures, including the "description" of the finance charge, which must be given "as applicable", Conn. Reg. 36-395-7(c) (12 C.F.R. § 226.8(c)). The ambiguity inherent in the term "as applicable" is clear. *See, United States* v. *Devonian Gas and Oil Company,* 424 F.2d 464 (2nd Cir. 1970).

Plaintiff seeks to distinguish *Adams* v. *New Haven U.I. Federal Credit Union,* ——F.Supp.—— (D. Conn. 1975) (Dkt. No. 15,632), CCH Consumer Credit Guide ¶ 998,619 (App't's Br., Add. B.) by arguing that the "finance charge here was not 'spelled out on the face' of the loan contract." App'ee's Br. pp. 25-26. This distinction is without merit. The contracts at issue in this case likewise "spell out" the notice of the finance charge with adequate specificity, since they inform the creditor precisely as to the amount which he or she must pay, in excess of the cash price, to purchase merchandise on credit. The record below is totally devoid of any indication that that "finance charge" figure can be broken down into components which, if separately disclosed, would give the creditor any information beyond the fact that credit purchasing will cost him or her a "finance charge" of a certain sum. *Ljepava* v. *M.L.S.C. Properties, Inc.,* 511 F.2d 935 (9th Cir. 1975), cited by plaintiff, is inapplicable. There is no indication in the opinion in that case that the finance charge, as here, consisted of only one item. Defendant respectfully submits that *Meyers* v. *Clearview Dodge Sales Inc.,* 384 F.Supp. 722 (E.D. La. 1974), and *Johnson* v. *Associates Finance Inc.,* 369 F. Supp. 112 (S.D. Ill., 1974), were improperly decided and should not be followed.

D. Although It Did Not File a Brief or Affidavit in the District Court, Defendant May Raise These Issues on Appeal.

In the last section of her brief, plaintiff argues that defendant, by not filing a brief or affidavit in the District Court, waived its right to litigate the propriety of the entry of partial summary judgment against it. This claim is without merit.

The law is clear that the burden rests upon the moving party to establish his right to summary judgment. The party opposing summary judgment, in order to defeat the motion, need file an affidavit in opposition *only* if the moving party's affidavit establishes the latter's right to judgment. *Adickes* v. *S. H. Kress & Co.* 398 U.S. 144 (1970); Advisory Committee Note to the 1963 Amendments to Rule 56, *reprinted at* 31 F.R.D. 647 (1963); 10 Wright, Federal Practice and Procedure §2739 (1973). In this case, the plaintiff's affidavit and the contracts attached thereto (App. pp. 15a-18a) do not, as discussed above and in defendant's prior brief, demonstrate the absence of all genuine issues as to material facts and the plaintiff's right to judgment as a matter of law. Fed. R. Civ. P. 56(c). Thus, there was no obligation on the part of defendant to come forward with a counteraffidavit.

Nor does the failure of defendant to raise in the District Court the legal issues before this Court constitute a bar to their consideration. Fed. R. Civ. P. 46,[5] relied upon by

5. Fed. R. Civ. P. 46 states:

> Formal Exceptions to rulings or orders of the court unnecessary; but for all purposes for which an exemption has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

plaintiff, does not apply to cases, such as this, where the issue raised for the first time on appeal is strictly a legal question and involves no factual dispute. In *Foster* v. *United States,* 329 F.2d 717 (2nd Cir. 1964), appellant abandoned the theory advanced in the trial court and advanced a "wholly different" contention on appeal. This Court considered that new theory, even though not previously raised:

> These contentions are wholly different from the points raised in the court below, but since only a question of law is involved, we will proceed to consider them. 329 F.2d at 718.

Accord, Evans v. *Triple R. Welding & Oil Field Maintenance Corp.,* 472 F.2d 713 (5th Cir. 1973); *Kurdziel* v. *Pittsburgh Tube Co.,* 416 F.2d 882, 886 (6th Cir. 1969).

Here no factual issue was properly before the District Court for its determination. The only issue raised by plaintiff's motion was the application of the Truth-in-Lending Act and Regulations and the case law thereunder to the contracts and affidavit to determine the existence of any material issue of fact and the plaintiff's right to judgment.[6] These are purely legal issues.

Furthermore, although plaintiff states that "no 'fundamental error' [is] present in the court's decision", App'ee's Br. p. 26., fundamental error does exist and, therefore, this Court should consider the propriety of the decision below. "Fundamental error" is error "which goes to the foundation of the claim or part of it." 5A Moore, Federal

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6. The District Judge in the instant case was fully aware of the legal questions involved in plaintiff's motion, since he had previously decided *Ives* v. *W. T. Grant Co.,* —— F.Supp. —— (Conn. 1974) CCH Consumer Credit Guide ¶98,847, *appeal pending* (2nd Cir.) (Dkt. No. 74-2131), which, although distinguishable from the instant case, raised the same issues.

Practice ¶46.02 at p. 1906 n. 9 (2d Ed. 1974). Applying this definition, it is difficult to conceive of any circumstances which are more fundamental than the improper application of legal principles resulting in a final judgment. Thus, for example, the Courts of Appeals have, almost without exception, held that the District Court's improper determination of conflict of laws principles constitutes fundamental error requiring reversal, despite the fact that the appellant did not direct the District Court's attention to the applicable substantive law. *Schultz* v. *Tecumseh Products,* 310 F.2d 426, 433 (6th Cir. 1962); *Parkway Baking Co.* v. *Freihofer Baking Co.,* 255 F.2d 641, 646 (3rd Cir. 1958); *United States* v. *Certain Parcels of Land,* 144 F.2d 626, 630 (3rd Cir. 1944).

In summary, this Court, in reviewing the District Court judgment, should apply the principle set forth by the Supreme Court in *Hormel* v. *Helvering,* 312 U.S. 552, 557 (1941).

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Cf. Empire Life Insurance Company v. *Valdak Corp.,* 468 F.2d 330, 334 (5th Cir. 1972) ("Appellate review does not consist of supine submission to erroneous legal concepts even though none of the parties declaimed the applicable law below.")

CONCLUSION

For the reasons and on the authorities set forth above and in defendant's prior brief, the judgment below should be reversed and the case remanded with instructions to dismiss for lack of subject matter jurisdiction; in the alternative, the judgment should be reversed and remanded for further proceedings.

Respectfully submitted,

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Dated: June 23, 1975

ADDENDUM

Griffith Garwood, Esquire
Chief, Truth In Lending Section
Federal Reserve Board
Washington, D. C.

Re: Regulation Z—§226.8(d)(3)

Dear Mr. Garwood:

This letter will follow up the telephone conversation which we had several days ago concerning the interpretation of §226.8(d)(3) of Regulation Z by the Federal Reserve Board.

As you know, with exceptions therein noted, this section requires disclosure of the total amount of the "finance charge" in a consumer credit transaction "with a description of each amount included". The question has arisen as to what must be disclosed in a typical retail instalment sale contract situation where the only finance charge is the typical "add-on" finance charge and there are no other components to the finance charge.

In this situation, is it sufficient to simply disclose the words "finance charge" together with the dollar amount of the charge, or must the disclosure contain an explanation that the finance charge is an add-on type finance charge and contains no other components?

My understanding from my telephone conversation with you is that the Federal Reserve Board would prefer disclosure of the words "finance charge", together with the amount of the charge. It is my further understanding that the attitude of the Federal Reserve Board was that it would prefer creditors not to obscure the clear impact of the disclosure of the "finance charge" by adding explanatory materials.

In view of the fact that the attitude of the Federal Reserve Board in this regard, and what appears to me to be the practice of creditors generally, does seem to be somewhat inconsistent with the strict language of Regulation Z, I would appreciate it if you could send me a letter reviewing the position of the Federal Reserve Board in this regard.

Thank you very much for your cooperation. If you have any questions, please do not hesitate to contact me.

Very truly yours,

In the
United States Court of Appeals
For the Second Circuit

Re Docket #75-7187

Jean D'Agosta
Plaintiff-Appellee

vs
W. T. Grant Company
Defendant-Appellant

On Appeal from the United States District Court for the District of Connecticut

Affidavit of Service by Mail

STATE OF NEW YORK
COUNTY OF New York } ss.:

Richard Lahey, being duly sworn, deposes and says:

I am over the age of twenty-one years and reside at 541 Watkins Drive, Mineola, in the County of Nassau, State of New York. On the 23rd day of June, 1975, at 4:30 o'clock p.m.

I served 2 copies of the
Reply Brief of Defendant-Appellant
in the above-entitled action on:

William H. Clendenen, Jr.
and David M. Lesser
152 Temple Street
New Haven, Connecticut

the attorney s for the

Plaintiff-Appellee

in the said action, by depositing said copies, securely wrapped, properly addressed, and postage fully prepaid, in a post office box regularly maintained by the U. S. Government in the post office at 90 Church Street, in the Borough of Manhattan, City of New York.

Richard Lahey

Sworn to before me this
23rd day of June , 19 75

Michael J. Hoops

MICHAEL J. HOOPS
Notary Public, State of New York
No. 30-4503056
Qualified in Nassau County
Commission Expires March 30, 1977